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THE INFLUENCE OF THE LAW OF NATURE UPON INTERNATIONAL LAW IN THE UNITED STATES¹

The political philosophers of the eighteenth century might have been surprised if told that their favorite doctrine of natural rights was the intellectual successor of certain theories of the Roman law and of the scholasticism of Saint Thomas Aquinas. Yet the "state of nature," which filled so large a place in the discussion of natural rights, has been called "an exaggerated perversion of what, in traditional system, was quite a subordinate point."² From Locke to Hooker, and back through the scholastic philosophy, the germ of natural rights has been traced to the *jus naturæ* and the *jus gentium* of the Roman law. Grotius and his successors preserved the tradition in another and more direct line. The continuity of Grotius with the doctrine of the Roman law was complete.³ "The law of nature," said Holland, "is the foundation, or rather the scaffolding, upon which the modern science of International Law was built up by Gentilis and Grotius."⁴ The change in the meaning of *jus gentium* made by Grotius and his successors, and the influence which the *jus naturæ* had in forming the new conception of the law of nations can only be referred to here.

There has been much confusion attendant upon the discussion of this change and influence, and there is no desire on the part of the writer to make what was once confusion again confounded.⁵

It will be the purpose of the present paper to consider the in-

¹ A paper read at the meeting of the American Political Science Association, held at Richmond, Virginia, December 31, 1908.

² Sir Frederick Pollock, Note G to his edition of *Maine's Ancient Law*. Carlyle, *Mediaeval Political Theory in the West*, I, Chap. 9.

³ Pollock's *Maine's Ancient Law*, Note H.

⁴ *Jurisprudence*, 10th Ed., 38.

⁵ "Mr. Bryce's recent essay on the Law of Nature should be read by all students of legal history," says Sir Frederick Pollock, in his note (page 387). To it may be added the latter's article upon the same subject in the *Journal of Comparative Legislation*, 1900.

fluence of the Continental text-writers upon the early American conceptions of the law of nations. The more one looks for definite statements by the revolutionary statesmen and their successors of principles drawn wholly from the law of nature, the more one loses the trail, and, indeed, one's sense of direction. All that can be done is to point out the extent to which the text-writers were read and used, to attempt to see how far their habits of thought and expression were adopted in America, and, finally, to single out certain counter-influences which made against any large adoption of the law of nature in America.

The case of *Triquet v. Bath* (3 Burrows, 1478) is frequently referred to for the purpose of showing how far the law of nations is a part of the law of England. In that case, decided in 1764, Lord Mansfield (on the authority of Lord Holt) expressed the dictum that "the law of nations was to be determined from the practice of nations and also from the authority of Grotius, Barbeyrac, Bynkershoek, Wicquefort and others, there being no English writer of prominence upon the subject." It will not do to press this frequently quoted dictum too far as regards the authority of these Continental writers. A recent English case thus comments upon *Triquet v. Bath*: "The expressions used by Lord Mansfield * * * ought not to be construed so as to include as part of the law of England opinions of text-writers as to which there is no evidence that Great Britain has ever assented, and *a fortiori*, if they are contrary to the principles of her laws as expressed by her courts."⁶ On the other hand, Chief Justice Marshall held distinctly in 1815 that the law of nations was a part of the law of the land, save, when, internally, a federal statute governed.⁷ Long before that time state and federal courts had been deciding cases, not according to English precedent, but according to what the judges held specifically to be the law of nations.

It has been stated that "the first half of the eighteenth century was not a time of special growth or importance in the history of International Law."⁸ If, however, it be remembered that this half-

⁶ West Rand * * * Co. v. King, L. R. 1905, 2 K. B. 391; see this JOURNAL, 1:217.

⁷ The Nereide, 9 Cranch, 388.

⁸ Professor Woolsey in Two Centuries' Growth of American Law, 494.

century practically covers the period from Pufendorf to Vattel, it will be seen to have been a time of very great development in this field, for during it the law of nations came to be differentiated from the law of nature. The writers from Grotius to Vattel so molded the law of nations that they may be said to have changed it from a body of rules, which ought to govern states, to a body of rules actually governing them. The law drew upon practice for authority as time went on, and conversely, practice was influenced by their statements of the law. Pufendorf, who succeeded Grotius, made no distinction between the law of nature and the law of nations, between *jus naturæ* and *jus gentium*. Furthermore he denied that there was any binding voluntary or positive law of nations. This much eliminated from the science, Pufendorf called his contribution the "law of nature and of nations." In it the law of nature filled the vacuum caused by the omission of the positive law.⁹ Vattel, influenced by Wolff, but by no means blindly following him, produced his work in 1758. Its title shows the change which had taken place since Pufendorf. The law of nations was with him "the principles of the law of nature *applied* to the conduct and affairs of nations and sovereigns." This book, says Professor Westlake, was the focus in which the schools of reason and of custom were first brought together, and from which the succeeding divergencies may be traced.¹⁰

At the time of the American Revolution the work of Vattel was the latest and most popular if not the most authoritative of the Continental writers. Citations of Grotius, Pufendorf, and Vattel are scattered in about equal numbers in the writings of the time. Possibly after the Revolution Vattel is quoted more frequently than his predecessors. References were frequently made also to other writers who discussed the law of nature in its broader sense: to Burlamaqui, in his *Principles of Natural and Politic Law*, to Rutherford, in his *Institutes of Natural Law* (founded upon Grotius). The law of nature played a part in the legal philosophy of the eighteenth century somewhat as did the doctrine of natural rights in the political thought of that era. Unfortunately the two were often confused. Still another

⁹ Westlake, Chapters on the Principles of International Law, 65.

¹⁰ Ibid., 38.

habit of thought led to confusion. The Newtonian conception of physical law was projected into the spheres of legal and political philosophy. The notion of "natural law" as the rule of the Creator, imposed upon the universe, was frequently tangled up with the current conceptions of the law of nature. Natural rights, natural law, and the law of nature, all had much influence over lawyers as well as statesmen in America, who made no clear distinctions among the three. When so orthodox a common-lawyer as Blackstone drew political doctrines from Locke and Montesquieu it is not surprising to find him imbibing legal philosophy from Grotius, Pufendorf, and Burlamaqui.

How great a vogue these and other writers upon the law of nature had among English-speaking people is evidenced by the number of English translations of their works. Grotius on *War and Peace* appeared in London in 1654, again in 1682, and in 1738. Pufendorf's *Law of Nature and of Nations* went through several editions in English: in 1710, 1716, 1729, with a fifth edition in 1749. Burlamaqui's *Principles of Natural and Politic Law*, which was published at Geneva in 1747, almost immediately appeared in English and before 1800 it had passed through seven editions. Blackstone's indebtedness to him for the earlier chapters of the Commentaries has frequently been noticed. A translation of Bynkershoek's work relating to captures was printed at London in 1759. A two-volume English edition of the *Elementa juris naturæ et gentium*, by Heineccius (1738), appeared with a London imprint in 1763. Wolff seems not to have appeared in an English dress, but Vattel, who represented at the time the greatest encroachment of the positive upon the natural law of nations, was soon translated into English. Written in 1758 an edition appeared in London before 1760. Several other editions followed until in 1833 the eminent legal name of Chitty gave it additional authority. It is evident, therefore, that there was no dearth of English versions of those Continental exponents of the law of nations to take the place of the English authorities the lack of which Lord Mansfield deplored in 1764. Just how soon copies of these works, either in the original or in translation, found their way to America is difficult to state. Among the books in the library of Colonel William

Byrd of Westover was Pufendorf in English and in Latin.¹¹ About 1770 Councillor Robert Carter of Virginia possessed Justinian, Grotius, and Pufendorf along with his Coke upon Littleton and Blackstone. Other instances might be cited to show that by the middle of the eighteenth century American lawyers, especially those trained at home and not at the Inns of Court, were more or less familiar with legal ideas somewhat alien to those whose studies had been confined to Littleton, Coke, the Abridgements, and the Reports. That law-students in the colonies should have turned to these writers upon the general principles of jurisprudence was not strange considering that law-libraries were small and infrequent, and that until after the Revolution there was no American text-writer or reporter. As the time of the Revolution drew near, and the doctrine of natural rights became more popular, law based upon universal principles was more attentively considered. As the contest with England progressed Americans turned from the argument based upon the legal rights of Englishmen to those founded upon the natural rights of man. With this change the somewhat popular notions of the law of nature were made use of. James Kent read Grotius and Pufendorf while pursuing his studies. Hamilton, Burr, and R. R. Livingston had the same master. Hamilton and probably the others were grounded in these authors. In February, 1775, Hamilton, then eighteen years of age, advised the "Westchester Farmer" to apply himself without delay to the study of the law of nature: "I would recommend to your perusal Grotius, Pufendorf, Locke, Montesquieu, and Burlamaqui. I might recommend other excellent writers on this subject; but if you attend diligently to these, you will not require any others."¹² In John Adams's *Novanglus* of 1774 we find Grotius, Pufendorf, and Barbeyrac quoted along with his favorites, Locke and Harrington. Columbia, then King's College, established a professorship of natural law in 1773. At William and Mary College about 1780 there were chairs of natural and politic law as well as of "law and police." Vattel and Burlamaqui were used as textbooks there as well as at Dartmouth, where the latter was used in the classroom from

¹¹ The Writings of Colonel Wm. Byrd, page 417.

¹² "The Farmer Refuted," Hamilton's *Hamilton*, II, 42.

1796 to 1828. The demand for Burlamaqui's *Principles* was so great that editions of it were printed at Boston in 1793 and at Cambridge, Massachusetts, in 1807.¹³ In December, 1775, Franklin acknowledged the receipt from Dumas of three copies of the latter's edition *Vattel*. The book, wrote Franklin, "came to us in good season, when the circumstances of a rising State made it necessary frequently to consult the law of nations. * * * (It) has been continually in hands of the members of our Congress now sitting."¹⁴ An American edition appeared from a press in Northampton, Massachusetts in 1805. De Martens's "Summary of the Law of Nations" had already appeared at Philadelphia in 1795 in a translation published by William Cobbett and dedicated to Washington. As a further evidence of the demand for the Continental writers may be mentioned the translation of a part of Bynkershoek published at the same place in 1808. Hoffman, in his "Course of Legal Study" (Baltimore, 1817), recommends as a general introduction to the law, *inter alia*, Burlamaqui, Rutherforth, Grotius, and Pufendorf. Burlamaqui he esteemed as "pleasing and useful," Rutherforth as "of inestimable value," while "no legal student, ambitious of deep and solid learning would be willing to acknowledge an unacquaintance with the treatises of Grotius and Pufendorf."

While most of the Revolutionary leaders were conversant with political philosophy few were legal philosophers. A notable exception was James Wilson, esteemed as the most learned lawyer of his generation. In his lectures on jurisprudence, delivered in 1790, one may follow the first American presentation of the principles of the law of nature and of nations. In them Wilson criticises Pufendorf's definition of law as the command of a superior which the inferior was bound to obey. Putting himself squarely upon the principle of popular sovereignty, Wilson urged that the validity of all law is derived from the consent of the governed. He condemns Grotius, Heinec-

¹³ Judge S. E. Baldwin in his *American Judiciary*, pp. 348 sqq., gives other facts relating to early American legal education, as does Professor James F. Colby in his article "The Collegiate Study of Law," *Report of American Bar Ass'n*, 1896.

¹⁴ Wharton's *Diplomatic Correspondence of the American Revolution*, II, 64.

cius, Wolff, and Domat, for denying that sovereignty is always in the people. Such a doctrine at which no civilian would have cavilled was to Wilson the admission of passive obedience. "The position that law is inseparably attached to superior power was the political weapon used with the greatest force and skill in favor of the despotic claims of Great Britain over the American colonies."¹⁵ Burlamaqui's position, that "virtual" sovereignty *may* reside in the people he dismisses as inadequate. Wilson would have the people actually and legally as well as virtually sovereign. The commanding sovereign is thus disposed of, but only in the case of municipal law. The law of nations is far different. Wilson in general follows Hooker's division of the law (derived from Thomas Aquinas), — those laws with God as author being the law celestial, or eternal, or physical, or made for man. If the laws made by God for man are communicated through reason and conscience they comprise the law of nature. If addressed to political societies they form the necessary or internal law of nations following Grotius, or, rather the law of nature as applied to nations, to use Vattel's phrase. But laws may be made by man. When so made they rest upon the same authority, namely, God. Such are municipal laws: those which political societies make for themselves. To these Wilson adds another class: those laws which two or more political societies make for themselves. In other words, following Vattel, he admits the voluntary or conventional law of nations. In all these classes the commanding authority is God. The obeying subjects are individuals or nations. No other source of authority is admitted. A human source leads to passive obedience and to tyranny. Following Barbeyrac and Burlamaqui he resolves "the supreme right of prescribing laws for our conduct and our indispensable duty of obeying those laws, into the omnipotence of the Deity, infinitely good, wise, and powerful."¹⁶ Hence the law of nature, whether applied to individuals or to states, is "immutable and universal," "God being under the glorious necessity of not contradicting himself." This statement follows the doctrines of the Continental writers, but Wilson adds that the law of nature alone has a command-

¹⁵ Works, I, 174.

¹⁶ Ibid., I, 98.

ing sovereign, all other laws have validity only through consent: through the consent of the sum of the people as municipal law (*vox populi, vox dei*); through the consent of states, if the voluntary law of nations. But the voluntary law of nations is always under the control of the law of nature, just as municipal laws are. While Wilson admits Pufendorf's contention that the obligation of the law of nature is the same in both cases, always universal, indispensable, and unchangeable, he shows the influence of Vattel (after Wolff) in admitting that the application of the law of nature to nations is really at times to be determined by the practices of nations. His conclusion is that "the law of nations is the law of nature *judiciously* applied to the conduct of states." Like Pufendorf, Burlamaqui, and Vattel, he stresses the internal obligations of states according to the law of nature. Externally, or as to other states, a nation should do no wrong, but always good, and to this end nations "should love one another." Such being the sum of the law of nature, given, like Hillel, while standing upon one foot, he finds the principles of the voluntary law practically comprised in the observing of treaty-faith. This counsel of perfection can hardly be called international law and is perhaps only a "rhetorical appeal."¹⁷ As the first attempt by an American, however, to give expression to the Continental law of nature it is perhaps not without historical value. It serves to show how far this able jurist went afield when once outside the well-beaten path of legal principle and precedent.

Such being the substance of the first American academic or philosophical presentation of the law of nations, we may turn to the earliest judicial consideration of the subject in order to determine how much the law of nature was applied in concrete cases. It is to be borne in mind in this connection that England was at the head of those European states which wished no concessions or reforms in the law of nations. The Continental writers holding to the law of nature discussed the law of nations as it ought to be. With this position British statesmen and judges with but few exceptions had little patience. Naturally the colonies, having become independent, took

¹⁷ Cf. Holland, *Jurisprudence*, 10th ed., 10.

an attitude the opposite of England's. Americans tended to range themselves upon the side deemed to be "liberal." By so doing they satisfied their own philosophical predilections and won some favorable response from the continent of Europe.

The attention of Americans was first drawn to the law of nations through the question of prize. In November, 1775, Massachusetts passed an act regulating *marque* and reprisal and established a prize court. During the year following the supreme court of Massachusetts decided that by March 7, 1776, Boston was a place besieged according to the law of nations, and upon that ground decided questions arising out of the seizure of vessels captured while carrying supplies to the British troops in Boston.¹⁸ Soon after the Massachusetts act was passed Washington pointed out to the Continental Congress the necessity of establishing proper courts for the decision of captures. The Congress thereupon legalized former captures and provided for future cases, recommending to the legislatures of the several colonies that they follow the example of Massachusetts. As the supreme body having control of war and peace, the Congress stipulated that appeals should be had to it. The various colonies acted upon this recommendation and in several of them prize cases were being tried even before independence was declared. The inability of the Congress to enforce its decrees upon appeal was one of the conspicuous failures of the Confederation. It is not the purpose of this paper to consider the many conflicts of authority between states and the Continental Congress upon procedure and appeals. In its appellate capacity "sixty-four cases were submitted to the committees of Congress, of which forty-nine were decided by them, four seem to have disappeared and eleven went over to the Court of Appeals" (created in 1780) for decision. "Fifty-six cases in all, including the eleven which went over, were submitted to the Court of Appeals and all were disposed of. Appeals were heard from every state except New York."¹⁹ As to how many cases were tried in the state courts and there disposed of without appeal there is no record. But few of them were reported.

Of the fifty or more cases decided in the Federal Court of Appeals,

¹⁸ *Glover v. The Brig William*, 7 Dane's Abr., chap. 227, sec. 12.

¹⁹ Article by J. C. Bancroft Davis, appendix to 131 U. S., xxxiv.

1 Dallas contains reports of eight. These prize-cases and the case of *Res-publica v. Longchamps*, also in 1 Dallas (Ill.), decided by the Pennsylvania court in 1784, are believed to be the first reported statements of the position which the law of nations had in American law. In the *Longchamps case* James Wilson assisted in the prosecution and cited the case of *Triquet v. Bath* as well as Vattel (book 1, sec. 6, and book 4, secs. 80–84) in urging the necessity “of sustaining the law of nations” and of showing the connection “between the law of nations and the municipal law.” Judge McKean, who had been trained at the Inns of Court, held an indictment good, in which the defendant was charged with an assault upon a member of the diplomatic corps (Barbé-Marbois), as constituting an offense against the law of nations. The opinion stated that “the law in its full extent is part of the law of this State (Pennsylvania), and is to be collected from the practice of different nations, and the authority of writers.”²⁰ Not much different it would seem, were the decisions of the courts in the prize-cases. In each case reported the court took the position that the question of prize or no-prize was to be decided wholly by the law of nations. In the case of *Talbot v. The Commanders of Three Brigs* (1 Dallas, 95), decided by the Pennsylvania high court of errors and appeals in 1784, President Dickinson refused to recognize the British distinction between instance and prize courts and proceeded to assume the fullest jurisdiction for his court. He denied that such a distinction prevailed elsewhere than in England. “Whatever in the law of nations relates to a court of admiralty, relates to this court, because no treaty has diverted its application. There was a time when we listened to the language of her Senates and courts, with a partiality of veneration, as to oracles. It is past — we have assumed our station among the powers of the earth, and

²⁰ In connection with the *Longchamps case*, it may be remarked that Pennsylvania went farther during the Confederation than any other state in giving consideration to foreign relations. Both the Supreme Executive Council and the Assembly paid much attention to the *Longchamps case*, and the former held several conferences with the French minister upon the subject. See the Minutes of the Supreme Executive Council of Pennsylvania, volume 14, pp. 115, 117, 121, 593. In 1782 the General Assembly passed an act “to secure the rights of Frenchmen according to the Treaty of 1778.” Pennsylvania Statutes at Large, X. 509.

must attend to the voice of nations — the sentiments of the society into which we have entered.” This view of Dickinson was not peculiar to him. Each decision followed the principle that the question of prize was determinable wholly by the law of nations. The federal court of appeals in the cases of the Revolution (1781, 2 Dallas, 1, 4) stated that the municipal laws of a country could not change the law of nations, so as to bind the subjects of another country. The court further held that the ordinance of Congress, passed April 7, 1781, adopting the French twenty-four-hour rule as to recapture, related only to subjects of the United States. As to neutrals, the question of prize was to be decided by the law of nations.

It is impossible within the space of this paper to consider more in detail these prize cases. From them, however, certain generalizations seem to be warranted: (1) that the state courts, as well as the federal court of appeal, assumed full jurisdiction; (2) that the English theory, rules, and precedents were not slavishly followed; (3) that the question of prize was held to be determined by the law of nations; (4) that the law of nations so adopted was largely that administered by the Continental courts of admiralty; (5) that there are fewer references to the Continental text-writers, identified with the law of nature, than the popularity of these writers in America might lead one to expect; and (6) that there was a persistent effort on the part of the Continental Congress to have the federal power the final judge of all matters involving questions of international law. The state courts continued to assert their jurisdiction as to prizes. This was resisted by Congress which declared, March 6, 1779, in aid of its right to determine such cases, that Congress “is by these United States invested with the supreme sovereign power of war and peace. That the power of executing the Law of Nations is essential to the sovereign supreme power of war and peace; that the legality of all captures on the high seas must be determined by the Law of Nations, and that the authority ultimately and finally to decide in all matters touching the Law of Nations does reside and is vested in the supreme power of war and peace.”²¹ This right was, of course, vindicated only by the adoption of the federal Constitution.

²¹ Journals of Congress, V, 86–90.

As the decisions of the courts prior to 1789 reveal an independent interpretation of the law of nations, avoiding the extremes of British precedent and of Continental theory, the other channel by which international law found its way into the United States remains to be considered, namely through diplomacy. It must be confessed that the determination of the amount of influence played by the law of nature upon the beginnings of American diplomacy is difficult. Much of the evidence is naturally of a negative character. Almost coincidently with the declaration of independence Congress appointed a committee to draft a treaty to be proposed to France. The report of this committee, probably shaped by John Adams, was afterwards revised by James Wilson, who also had a hand in framing the instructions to accompany the proposed treaty. The French treaty of commerce of 1778 follows to a remarkable degree that draft prepared by the committee in the summer of 1776. Many articles of the draft were incorporated in the treaty without change either of idea or of phrase. In the draft are contained many of the principles upon which later commercial treaties were prepared. In one instance at least (the provision of the draft that import dues should be laid uniformly upon the subjects of both treaty-powers) the draft went beyond the prevailing commercial practices of European nations. For the rest the provisions of the draft are in harmony with the most liberal European usage. How far Continental practice relative to the matters contained in the draft had been modified by the text-writers cannot be considered here. The draft appears to have been prepared with the idea that the United States would adopt these usages, having always a due regard for its own commercial welfare. In no sense does the draft appear to have been prepared wholly upon the theory that the treaty should be declaratory of the law of nature. Sometimes the provisions of the draft run behind and sometimes ahead of the doctrines of Vattel, then the most recent writer upon the subject. Thus upon the question of contraband, wholly a matter of practice and of treaty-stipulation, and not of the law of nature, the draft confines forbidden property strictly to arms and munitions of war, following the provisions of the Russo-British treaty of 1766.²²

²² Wheaton's *History of the Law of Nations*, 298, n.

Vattel's list is larger, including naval stores and even provisions.²³ That the draft narrowed the list of contraband may be ascribed to the desire of Adams and his colleagues to provide for a legitimate neutral trade for the United States in case France might be engaged in war on her own account.

Upon the right of visitation in order to ascertain the presence of contraband, the draft makes more liberal provision than Vattel, who held that a vessel refusing to be searched could from that proceeding alone be condemned as lawful prize. The draft permitted visitation only, with an inspection of the ship's papers. This stipulation for the giving of full credit to ship's papers had been recognized by Bynkershoek and Vattel as in harmony with the best-established usage.

As regards neutral duties and rights, we come nearer to the law of nature. It is true that Wolff held that neutrality was an abnormal condition for a state, but Wolff held more to the law as based upon practice. Vattel's development of the idea of neutrality was based upon the law of nature: that by the law of nature nations are in a state of peace and have a right to remain so. The great development to which American diplomacy gave to the doctrine of neutrality in 1793 (which Genet connected with the "aphorisms of Vattel" ²⁴), had its origin at the very beginning of American independence. Its foundations were laid by those Continental text-writers who held that by the law of nature the natural state of nations was peace and not war; that peace was the normal and war the abnormal condition.²⁵ Vattel in using this axiom develops the idea so far as to lay down the rule that neutrality includes not only the right to abstain from war, but the duty to observe "a strict impartiality toward the belligerent powers." With this doctrine the committee must have been familiar. Later as developed under Washington it became the basis for America's great contribution to the law of nations and indeed, for the vindication of her independence.²⁶

²³ Vattel, Book III, sec. 113.

²⁴ Jefferson to Gouverneur Morris, Aug. 16, 1793, *Am. State Papers*, For. Rel. I, 168.

²⁵ Cf. Lorimer, II, 52.

²⁶ Hall's *International Law*, 4th ed., 615.

The correspondence over the treaty of peace with England yields negative results as to the law of nature. Upon two subjects of long and careful discussion, the fisheries and the navigation of the Mississippi, the American commissioners argued to some extent from the law of nature. This, however, is not so much the law of nature as found in the texts as natural law in the sense of physical configuration.²⁷ The instructions of Congress of August 14, 1779, insisted upon the free and undisturbed exercise of the common right of Americans to fish on the Newfoundland banks. In other words, the claim was based upon long usage and not upon the law of nature. The right to navigate the Mississippi was claimed by the "law of nature," it is true, but Franklin's famous remark seems to point to physical conditions.²⁸ While Adams mentions the law of nature as giving the right to free navigation of the Mississippi, he is careful to add that it was ours because of the charters and as a consequence of the Revolution.²⁹ The characters and temperaments of the negotiators, British and American, were not such as to resort to many arguments beyond expediency and opportunism. Each side was after the best settlement possible and little effort was expended in what would have seemed more or less abstract and academic.

Notwithstanding the predilection of American for philosophical generalization, the confusion between the law of nature and natural rights, and the familiarity which the early American jurists had with the Continental writers, the positive impress of the law of nature upon the American ideas of the law of nations seems upon the whole not to have been great. Specific instances of the incorporation of the law of nature into the law of nations, as interpreted by Americans, are few. For this apparently negative result certain causes may be mentioned: (1) the spirit of the law of nature, the *jus naturæ*, was really alien to lawyers whose thought lay within the common law;

²⁷ John Adams's Journal, November 25, 1782; Wharton's Diplomatic Correspondence of the American Revolution, VI, 72.

²⁸ "Poor as we are, yet as I know we shall be rich. I would rather agree with [Spain] to buy at a great price the whole of their right than sell a drop of its waters. A neighbor might as well ask me to sell my street door." Franklin to Jay, October 2, 1780. Ibid., IV, 75.

²⁹ Ibid., VI, 31.

(2) the notion of sovereignty developed by the Continental writers was drawn from the Roman law, and was opposed to that of popular sovereignty; (3) the law of nations early crept into American courts in connection with questions of prize, a subject to be dealt with according to international practice; (4) Vattel was the last of the great text-writers upon the law of nations drawn from the law of nature. After Vattel Kant transformed the law of nature into a new *Natur-recht*. By this later influence American jurists were untouched. On the other hand, the influence of Bentham in the course of little more than a generation materially changed the theory of the law both in England and in America; (5) the adoption of the Federal constitution gave an opportunity for the uniform development of international law as applied to concrete cases. After 1789 there was a growing body of law upon which American diplomats grew more and more dependent. The spirit of the common law, which exalts the case and neglects the text-writer, has always dominated our courts. With the establishment of the Federal supreme court began, case by case, an authoritative and fairly uniform exposition of international law. The growing body of American precedent rendered references to the Continental writers less necessary.

At the outset, when Americans came for the first time into contact with international questions, when they had no precedents of their own, familiarity with Continental writers was of great importance. The principles of the law of nature provided a basis of authority for departing from the rules of British usage. The doctrine of natural rights furnished a political ideal for individuals. The principles of the law of nature assisted in giving to the founders of the Republic an idealistic conception of its rights as a nation and of its duties toward other states.

JESSE S. REEVES.